ORIGINAL

Supreme Court, U.S.
FILED
AUG 20 1999
CLERK

No. 98-9741

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

THOMAS KNIGHT,
N/K/A ASKARI ABDULLAH MUHAMMAD,

Petitioner,

-vs-

FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

BETH C. WEITZNER*
Assistant Public Defender

and

LOUIS CAMPBELL
Assistant Public Defender

*Counsel of Record for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I.

RESPONDENT ERRS IN CONTENDING THAT NO FACTUAL PREMISE PERTAINING TO THE CIRCUMSTANCES OF PETITIONER'S OWN INCARCERATION OR SUFFERING WAS PRESENTED TO THE STATE COURTS 1

II.

RESPONDENT ERRS IN CONTENDING THAT THE PETITIONER ACTUALLY BENEFITTED FROM THE DELAY 5

III.

RESPONDENT ERRS IN CONTENDING THAT CONSIDERATION OF THE CCP AGGRAVATING FACTOR COULD NOT HAVE AFFECTED THE RESULT 7

IV.

RESPONDENT ERRS IN CONTENDING THAT THERE COULD BE NO EX POST FACTO VIOLATION BECAUSE AT THE TIME OF THE CRIMES ANOTHER STATUTORY AGGRAVATOR EXISTED WHICH INCLUDED THE CCP AGGRAVATING CIRCUMSTANCE 9

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Combs v. State
403 So. 2d 418 (Fla. 1981) 9

Cooper v. State
336 So. 2d 1133 (Fla. 1976) 10

Eddings v. Oklahoma
455 U.S. 104 (1982) 6

Hitchcock v. Dugger
481 U.S. 393 (1987) 5, 6

Jones v. State
705 So. 2d 1364 (Fla. 1998) 11

Knight v. Dugger
863 F.2d 705 (11th Cir. 1988) 6, 8

Knight v. State
721 So. 2d 287 (Fla. 1998) 8, 10

Lackey v. Texas
115 S.Ct. 1421 (1995) 5

Lewis v. State
398 So. 2d 432 (Fla. 1981) 10

Lockett v. Ohio
438 U.S. 586 (1978) 6

Menendez v. State
368 So. 2d 1278 (Fla. 1979) 10

Muhammad v. State
426 So. 2d 533 (Fla. 1981) 6

Nibert v. State
574 So.2d 1059 (Fla. 1990) 11

Riley v. State
366 So. 2d 19 (Fla. 1978) 10

Skipper v. South Carolina
476 U.S. 1 (1986) 6

Sochor v. Florida
504 U.S. 527 (1992) 8

Songer v. State
544 So. 2d 1010 (Fla. 1989) 11

Songer v. State
365 So. 2d 696 (Fla. 1978) 6

State v. Dixon
283 So. 2d 1 (Fla. 1973) 10

Stringer v. Black
503 U.S. 222 (1992 8

Vaught v. State
410 So. 2d 147 (Fla. 1982) 10

FLORIDA STATUTES

§ 921.141(6)(b), Fla. Stat. (1995) 4

§ 921.141(6)(f), Fla. Stat. (1995) 4

TREATISES & ARTICLES

Jonathan Kennedy, Florida's "cold, calculated and
premeditated aggravating circumstance in death penalty cases,
17 Stetson L. Rev. 47, 59-60 (1987) 11

No. 98-9741

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

**THOMAS KNIGHT,
N/K/A ASKARI ABDULLAH MUHAMMAD,**

Petitioner,

-vs-

FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner Thomas Knight, now known as Askari Abdullah Muhammad, submits this reply to Respondent's brief in opposition to Petitioner's certiorari petition.

I.

RESPONDENT ERRS IN CONTENDING THAT NO FACTUAL PREMISE PERTAINING TO THE CIRCUMSTANCES OF PETITIONER'S OWN INCARCERATION OR SUFFERING WAS PRESENTED TO THE STATE COURTS.

Regarding petitioner's claim that execution after more than two decades on death row would be unconstitutional, the respondent asserts that "no factual premise pertaining to the

circumstances of Petitioner's own incarceration or suffering were presented to the state courts" and that the claim was therefore not fairly presented below. (Response at 14; see also Response at 15 footnote 4). The respondent's assertion is incorrect: The petitioner's written motion alleged both suffering and an exacerbation of his mental illness as a result of his prolonged incarceration on death row (R. 1441-43); at the time the motion was ruled upon, the court had heard extensive evidence concerning the circumstances and conditions of incarceration; and the court's unexplained denial of the motion was certainly not based on any insufficiency of that allegation or of the evidence to support it, since the court subsequently found that the mental impact of the years on death row had been "devastating" (R. 1540-41).

The petitioner's motion to preclude imposition of the death penalty because of the excessive delay was initially presented (with leave of court) as an ore tenus amendment to another motion before the resentencing proceeding began. (T. 3-17). It was renewed, in writing, on February 7, 1996, after all the evidence had been presented to the jury, and was considered and denied during the charge conference which took place on that day. (R. 1436-58; T. 3740-41). The evidence presented included testimony and exhibits regarding the circumstances and conditions of Mr. Muhammad's incarceration on death row, both when he was on regular death-row status and when he was in the special isolation unit. (T. 2235-59, 2270-71, 2295-97, 2314-15, 3534-50). There was also expert witness testimony (some of it elicited by the state in cross-examination) regarding the effect of such conditions upon

the prisoner's mental state. (T. 2572-73, 2579-80, 2593-94).[1]

In the written motion filed on February 7, 1996, the petitioner did argue (as he does now) that prolonged incarceration under a sentence of death involves inherent cruelties.[2] He also suggested that an objective standard (rather than the subjective suffering of a particular inmate) should be used to determine whether prolonged incarceration on death row is cruel and unusual. However, he also alleged that he had indeed suffered while on death row and that his mental illness had been "exacerbated as a result of being subjected to the terrible stress and mental anguish that is a daily part of life under a sentence of death." (R. 1441-43).

The sentencing judge did not explain why he denied either the initial motion or the renewed motion (T. 13, 3741). It certainly was not because of an insufficiency in the

---

[1]Contrary to what the respondent appears to suggest (Response at 15 n. 4), there was considerable evidence about the complete isolation which Mr. Muhammad endured for several years in what the court described as "punitive solitary confinement" (R. 1540). Among other things the evidence showed the following: The cell was completely enclosed (T. 3536), there was no television (T. 3547), there were no yard privileges (T. 2296), the door was opened only a few times a day, for a minute or two (T. 3548). The only human contact was, in the trial court's words, "the occasional check by a corrections officer." (R. 1540).

Since, as appears from the respondent's own brief, there is no dispute that Mr. Muhammad was in fact held for years in a special isolation unit, or that evidence was presented in this regard, the respondent's assertion that "[n]o evidence with respect to the 'X wing,' now relied upon by the Petitioner was presented" (Response at 15 n. 4), apparently reflects only a quarrel about the unit's name. Petitioner does not disagree that, as he stated in the petition, that unit was known as "Q Wing" at the time Mr. Muhammad was held there.

[2]In support he cited the statements and opinions of numerous jurists, legal commentators, and mental health experts. (R. 1441-43).

allegation of personal suffering or in the evidence to support it. The judge subsequently found that the years on death row had detrimentally affected the defendant's mind, and used that conclusion as a basis for discounting the testimony of several of the defense expert witnesses regarding the defendant's mental state at the time of the crimes. (R. 1540-41). In his sentencing order, the judge found that the impact upon the mind of prolonged incarceration in the "austere conditions" and "relative isolation" of death row, and the even more severe isolation of what was then known as Q Wing, must have been "devastating." (R. 1540). So devastating was that impact, in fact, that the judge felt that the opinions of experts who had seen Mr. Muhammad after he had been five or more years on death row could not be relied upon in assessing the applicability of the statutory mental mitigators[3]. As explained by the judge in his sentencing order:

> In considering the testimony of [defense expert witnesses] Drs. Fisher, McClaine, Carbonell and Toomer the court notes not only the passage of time between the day of the crimes and the day of the evaluations, but also the effect that time must have had on the defendant's state of mind. When Dr. Fisher first saw the defendant in 1979 the defendant had been in the relative isolation of death row for five (5) years. It is difficult to imagine what living under such circumstances must be like. But it would be unreasonable to believe that such austere conditions as exist there would not have a significant impact on a man's mind. By the time Dr. Fisher and Dr. Carbonell saw him in 1989 the defendant had been in what has been referred to as "Q-Wing", i.e. punitive solitary confinement, for nine (9) years. By the time Dr. McClaine examined him, he had been in "Q-Wing" for eleven (11) years, and by the time Dr. Toomer saw him he had been there for sixteen (16) years. **The impact on the human mind [of] that nine (9) to sixteen (16) years in solitary confinement, in a six (6) by eight (8) foot cell, without any companionship but for the occasional check by a corrections officer, must be devastating. The court considers the passage of time in assessing the reliability of the opinions of the doctors who examined the defendant.**

(R. 1540-41) (emphasis added).

[3]Among the mitigating circumstances provided by Florida's death-penalty statute are that "[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance," §921.141 (6) (b), Fla. Stat. (1995), and that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired," § 921.141(6)(f), Fla. Stat. (1995).

Thus, assuming for the sake of argument that it is necessary to show personal suffering in order to question the constitutionality of execution after decades on death row, that supposed requirement (which was not mentioned by either the trial court or the Florida Supreme Court in denying the Lackey claim) was amply satisfied here.

II.

RESPONDENT ERRS IN CONTENDING THAT THE PETITIONER ACTUALLY BENEFITTED FROM THE DELAY.

The respondent also argues that Mr. Muhammad has benefitted by his prolonged incarceration on death row. (Response at 10-11, 16-18). According to the respondent, the reversal of the original sentence was predicated on this Court's decision in Hitchcock v. Dugger, 481 U.S. 393 (1987), and the 14-year delay between sentence (1975) and reversal (1989) allowed petitioner to benefit from that decision, (Response at 17-18), which, according to the respondent, changed the law by "invalidat[ing] Florida's prior standard jury

instructions with respect to consideration of non-statutory mitigating factors" (Response at 13).

Contrary to respondent's assertions, this Court's decision in Hitchcock was based on an "examination of the sentencing proceedings actually conducted in [Hitchcock's] case" and did not even reach the question of what was in fact required by Florida law. 481 U.S. at 397. This Court concluded, based on that examination of the record, that the proceedings did not comport with the requirements of Skipper v. South Carolina, 476 U.S. 1 (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978). 481 U.S. at 398-99. Thus, the constitutional requirements which required reversal of Mr. Muhmamad's original sentence had been recognized for years before his sentence was finally reversed in 1989. Indeed, in reversing based on what it referred to as Mr. Muhammad's "Lockett claim" the Eleventh Circuit Court of Appeals noted that "the Florida Supreme Court addressed the Lockett issue on the merits (albeit in the context of ineffectiveness) in Muhammad v. State, 426 So. 2d 533, 536 (Fla. 1981)." Knight v. Dugger, 863 F.2d 705, 708 n. 5 (11th Cir. 1988).

Moreover, the petitioner notes that according to the Florida Supreme Court's opinion in Songer v. State, 365 So. 2d 696, 700 (Fla. 1978), neither the death penalty statute nor the Florida Supreme Court's decisions construing it had ever precluded consideration of non-statutory mitigating evidence. Accordingly, the restrictions placed on the consideration of non-statutory mitigation during the 1975 sentencing proceeding, which led to reversal in 1989, were not only contrary to constitutional requirements recognized as early as 1978, they

were contrary to the requirements of the statute enacted in 1972. There was no "benefit" to Mr. Muhammad in having had to endure 14 years on death row before the necessity of a new sentencing proceeding was recognized by the courts.

In addition, the passage of time certainly did not have a beneficial effect on the presentation of the defense case. For example, in 1979, the state legislature enacted a new aggravating circumstance (cold, calculated, premeditated) which was used against the petitioner at resentencing. The sentencing judge discounted the opinions of those defense experts who had seen Mr. Muhammad after several years on death row, because of the "devastating" mental impact of prolonged incarceration under those conditions. (R. 1540-41). And as to the two defense expert witnesses who had examined Mr. Muhammad shortly after the crimes, the prosecutor described the testimony of one of them to the jury in the following terms: "He really did not have any recollection of this. He was the elderly man from Ocala who basically read his report to you, or report he had made many years ago." (T. 3831-32).

Finally, the devastating impact upon his mind of more than two decades on death row (R. 1540-41), cannot be considered a benefit, in any ordinary, human sense.

III.

RESPONDENT ERRS IN CONTENDING THAT CONSIDERATION OF THE CCP AGGRAVATING FACTOR COULD NOT HAVE AFFECTED THE RESULT.

The respondent argues that the result of the resentencing would have been the same even in the absence of the CCP aggravator, because the trial court found other aggravators

and stated that "even in the absence of this aggravating circumstance [CCP], the court's analysis and conclusions herein would not change." (Response at 19). However, in a weighing state such as Florida, in order to guarantee that application of an invalid aggravating circumstance did not deprive the defendant of the individualized sentence required by the Eighth Amendment, the state appellate court must either remand for resentencing or "itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error." Sochor v. Florida, 504 U.S. 527, 532 (1992); see also Stringer v. Black, 503 U.S. 222, 232 (1992).

Here, the Florida Supreme Court, which found no error in the application of CCP, certainly conducted no reweighing or harmless-error analysis with regard to this aggravator. The trial court's statement could not cure the error of applying the CCP aggravating circumstance to crimes which occurred several years before its enactment, in violation of the Ex Post Facto Clause. Aside from the fact that the trial judge also stated that he gave the CCP factor "great weight" (R. 1528), his analysis included another factor (HAC) to which he also gave "great weight," but which the Florida Supreme Court held was not supported by the evidence. Knight v. State, 721 So. 2d 287, 298-99 (Fla. 1998).

The respondent also notes that the petitioner was originally sentenced to death without the use of the CCP aggravator. (Response at 19). However, that fact is irrelevant because the weighing process which resulted in that sentence was held to be constitutionally defective. Se Knight, 863 F. 2d at 708-10.

IV.

RESPONDENT ERRS IN CONTENDING THAT THERE COULD BE NO EX POST FACTO VIOLATION BECAUSE AT THE TIME OF THE CRIMES ANOTHER STATUTORY AGGRAVATOR EXISTED WHICH INCLUDED THE CCP AGGRAVATING CIRCUMSTANCE.

The respondent argues that retrospective application of the cold, calculated, premeditated aggravating circumstance (CCP) did not violate the Ex Post Facto Clause because, according to the respondent, at the time of the commission of the crimes there was a statutory aggravating circumstance, namely heinous, atrocious or cruel (HAC), which "specifically encompassed and included" a cold, calculated design to kill, and that the subsequent enactment of CCP as a separate aggravating factor imposed limitations on the circumstances which could be considered in aggravation, and those limitations inured to the benefit of the defendant. (Response at 23-25).

This additional rationale was not mentioned by the Florida Supreme Court either in this case or in Combs v. State, 403 So. 2d 418 (Fla. 1981), where the retrospective application of CCP was first held not to constitute a violation of the Ex Post Facto Clause.

There are numerous decisions of the Florida Supreme Court which contradict the respondent's argument that HAC includes the CCP aggravating circumstance. Indeed, in Combs itself the Florida Supreme Court rejected the argument that HAC and CCP address the same aspect of the murder, and held that applying both aggravators did not constitute an impermissible "doubling up" of aggravating circumstances. Combs at 421.

In cases arising both before and after 1979, the Florida Supreme Court has held explicitly that even a premeditated, cold and calculated murder, is not HAC unless, as required by State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), the commission of the crime "was accompanied by such additional acts as to set the crimes apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." E.g., Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981) (error to find HAC based on the fact that "the murder was premeditated, cold and calculated and stealthily carried out," because, under the standard stated in Dixon, "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous atrocious, or cruel"); Cooper v. State, 336 So. 2d 1133, 1140-41 (Fla. 1976) ("execution-type murder" of police officer was not HAC); see also Menendez v. State, 368 So. 2d 1278, 1281-82 (Fla. 1979); Riley v. State, 366 So. 2d 19, 21 (Fla. 1978).

This continues to be the Florida Supreme Court's interpretation of HAC. In the present case, it was held to be error to find that the "execution-style killings" were HAC. Knight v. State, 721 So. 2d 287, 298-99 (Fla. 1998). By contrast, the case upon which the respondent most relies, Vaught v. State, 410 So. 2d 147 (Fla.1982 , appears never to have been cited in Florida for its discussion of HAC, and that discussion is incompatible with the Florida Supreme Court's previous and subsequent holdings that HAC refers to the unnecessarily torturous character of the murder, rather than to the defendant's intent to kill.

In addition, the legislative history shows that the enactment of CCP was a direct

response to cases such as Menendez and Riley, which involved "execution-style" killings but where HAC was held to be inapplicable. It was intended as an additional aggravating circumstance which would secure the death penalty in such cases. See Jonathan Kennedy, Florida's "cold, calculated and premeditated aggravating circumstance in death penalty cases, 17 Stetson L. Rev. 47, 59-60 (1987) (citing Senate Staff Analysis and Economic Impact Statement S523 at 4 (1979), and notes of Senator Guy Spicola).

There is no support for the argument that enactment of CCP somehow limited the HAC aggravator, which was left unchanged by the Florida Legislature. Thus, even if it is assumed for the sake of argument that what was enacted as CCP was included in HAC, this multiplication of aggravators could not possibly be beneficial to defendants, as the respondent contends. To the contrary, it is a substantial disadvantage since an additional aggravator may make a person death eligible who was not so before. In Florida, a death sentence based on a single aggravating circumstance will not be upheld unless there is little or nothing in mitigation. Jones v. State, 705 So. 2d 1364, 1366 (Fla. 1998) ("while this Court has on occasion affirmed a single-aggravator death sentence, it has done so *only where there was little or nothing in mitigation*") (original emphasis); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990) (same); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989) (same). This rule applies even where the sole aggravator is HAC. Nibert. Adding CCP to the list of statutory aggravators was a substantive and detrimental change. The retrospective application of that aggravator to the petitioner violated the Ex Post Facto Clause.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the writ should be granted.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

By: Beth C. Weitzner
BETH C. WEITZNER*
Assistant Public Defender

and

By: Louis Campbell
LOUIS CAMPBELL
Assistant Public Defender

August 20, 1999

*Counsel of Record